

REMARKS

Claims 1-71 remain in the case. The allowance of Claims 67 and 68 is noted with appreciation. We also note with appreciation the indicated allowability of most, if not all, of the rejected claims if certain changes are made the wording used.

Reconsideration is requested in light of the following comments, which are keyed to the numbering used in the Action.

1. Paragraph 1 of the specification has been amended to give the meanings of the acronyms known to those skilled in the art and explained elsewhere in the specification. Thus the required appropriate correction has been made.

2-4. Merely for the purpose of expediting prosecution, the expression "at least about" has been revised to read "about . . . or more" in each of the claims where the former expression appeared. These two expressions mean exactly the same thing, as those skilled in the art readily appreciate. In this connection, a search of the PTO data base indicates that from 1976 to the present, a vast number of patents, perhaps as high as about 61,755 patents, have been issued by the PTO containing the expression "at least about" in the claims. Moreover, the data indicates that since the beginning of 1992 -- the year following the year in which the cited *Amgen v. Chugai* opinion was rendered -- the PTO has granted a large number of these patents, perhaps as many as 36,641. Enclosed and marked for identification as Exhibit A are two pages of computer printout showing the total number of patents listed in the overall database that responded to the inputs for a claim containing the expression "at least about", and showing holographically that listing number 36641 (5,077,843) was the first patent issued in 1992, thus indicating that about 36,641 of such patents were issued after 1991. Thus vast numbers of Applicants and PTO Examiners have found nothing wrong with this expression.

It is to be noted that the *Amgen v. Chugai* opinion is based on a highly unusual set of facts where, for example, methods to obtain the values in question were quite inaccurate or imprecise, and where an amendment using this expression had been made to avoid a direct anticipation. Thus the case involved a situation where there could be reason to believe that the "about" value might still read on the prior art because of inability to accurately measure the values in question.

Clearly, the factual basis for *Amgen v. Chugai* does not apply to the present factual situation. Note in this connection that the court in *Amgen v. Chugai* cautioned that "our holding that the term 'about' renders indefinite claims 4 and 6 should not be understood as ruling out any and all uses of this term in patent claims."

Secondly, in the expression "at least about 40%" it is agreed that "about 40%" is acceptable. Thus in interpreting the expression "at least about 40%", one only needs to determine what "about 40%" means. The words "at least" merely state that whatever "about 40%" is, it is the minimum value or the lower end of a range. However, since exactly equivalent English language exists for the expression "at least about", Applicants are expediting prosecution by using such equivalent language ("about . . . or more") since by doing so, the scope of the claims has NOT been changed one iota.

As to "in the range of about", a search of the PTO database indicates that from 1976 to the present, a vast number of patents, perhaps as many as about 63,354 patents, have been issued by the PTO containing the expression "in the range of about" in the claims. Moreover, since the beginning of 1992 -- the year following the year in which the cited *Amgen v. Chugai* opinion was rendered -- the data indicates that the PTO has granted a large number of these patents, perhaps as many as about 35,409 patents. Enclosed and marked for identification as Exhibit B are two pages of computer printout showing the total number of patents listed in the overall database that responded to the inputs for a claim containing the expression "in the range of about", and showing holographically that listing number 35409 (5,078,486) was the first patent issued in 1992, thus indicating that a large number of these patents, perhaps as many as about 35,409 of such patents were issued after 1991. Thus vast numbers of Applicants and PTO Examiners have found nothing wrong with this expression.

In this case, no amendment of the language has been made because there appears to be no acceptable direct substitute in the English language for this expression. An expression such as "in the range of about 40% to about 60%" says the following:

- a) There is a range of values.
- b) One value, or more than one value, is to be in this range of values.

- c) What is the lower end of this range of values? Answer: "about 40%", an expression which is agreed to be acceptable.
- d) What is the upper end of this range of values? Answer: "about 60%", an expression which likewise is acceptable.

We can see nothing indefinite in this expression. Nor did the Examiners in such typical post 1991 U.S. patents as 5,395,871 (Claim 11); 5,322,870 (Claims 2, 3, 7-10); 5,272,201 (Claim 18); 5,260,353 (Claims 8, 16, 39, 47, 58, 66); 5,221,699 (Claim 9); 5,128,401 (Claim 2); 5,116,890 (Claims 2, 30); and 5,104,914 (Claim 3). It is also to be noted that whatever *Amgen v. Chugai* stands for, it did not involve the expression "in the range of about".

Accordingly, reconsideration of the 112, second paragraph, rejections set forth in Paragraphs 3. and 4. of the Action is requested. The claims are submitted to use language which has long standing approval of the PTO itself.

5. Claim 55 has been amended as suggested in the Action. Thus the 112, second paragraph, rejection is inapplicable. Clearly, no change in scope whatsoever has been made by this amendment.

6. The 112 rejection of Claims 14, 29, 30, 42, 51, 59, and 63 as allegedly indefinite should also be reconsidered and withdrawn. In the first place the Action merely states an opinion of the Examiner -- no evidence, or even a reasonable basis in support of the rejection has been presented. Thus, the rejection is without sufficient foundation, and is deemed unsupportable. Furthermore, in contrast to the opinion stated in the action, the words used in the claims would clearly be found clear by those skilled in the art. Claims 14, 30, 42, 51, and 63 use similar wording for the proviso. In Claim 14, the proviso reads as follows:

- a) in a case where one such component does not have an ascertainable melting temperature and the other component has an ascertainable melting temperature, the temperature at which said one such component softens or becomes pliable is within about 10 centigrade degrees above or below the melting temperature of said other component; and

- b) in a case where neither component (A) nor component (B) has an ascertainable melting temperature, the temperature at which one such component becomes soft and pliable is within about 10 centigrade degrees above or below the temperature at which the other such component becomes soft and pliable.

From this the skilled artisan knows that the proviso applies only in one of two specified situations. The skilled artisan also knows when a polymer melts, and when it does not melt but instead becomes soft and/or pliable. There is nothing in the disclosure to indicate that the degree of softening or pliability is critical -- it is the temperature at which softening or pliability occurs that is specified. This same situation applies in the case of Claims 29 and 59 where the component is melted or becomes soft and pliable and then cooled to ambient room temperature. Here it is clear that if on heating the component does not melt, it is heated to a temperature at which it softens or become pliable, which conditions are readily perceivable by an average person, and especially by one of ordinary skill in the art.

Moreover, the terms "soft and pliable" (or pliant) have been used in numerous patents without use or disclosure of numerical values, obviously because these are words of common usage by those who communicate in English. To illustrate, a search of the PTO data base indicates that from 1976 to the present, a vast number of patents, perhaps as high as about 27,269 patents, have been issued by the PTO containing the term "soft" in the claims. No doubt many such patents do not rely on numerical values as regards "soft", because this term is a well understood term in the context of whether something like a polymer that is not melted becomes soft. The same applies to "pliable" and its synonym "pliant". For example, a search of the PTO database indicates that from 1976 to the present, a vast number of patents, perhaps as high as about 5,589 patents, have been issued by the PTO containing the term "pliable" in the claims. No doubt many such patents do not rely on numerical values as regards "pliable", because this term is a well understood term in the context of whether something like a polymer that is not melted becomes pliable.

Before leaving this matter we call attention to the enclosed patent 6,886,739, marked for identification as Exhibit C, regularly issued by the PTO which, in describing materials to be used

PATENT
Case FR-7294

in making the claimed dispenser, specifies in Claims 2, 9, and 14, "a relatively soft pliable polymeric material". No polymeric materials are specifically identified in the disclosure and no numerical values for the softness or pliability of the polymeric material are specified. Surely if the PTO sees no objection to "a relatively soft pliable polymeric material", there is no basis for asserting that present claims 14, 29, 30, 42, 51, 59, and 63 are indefinite especially since a large number of polymeric materials are identified in the present specification and temperatures at which they either melt or become soft and/or pliable are readily perceived.

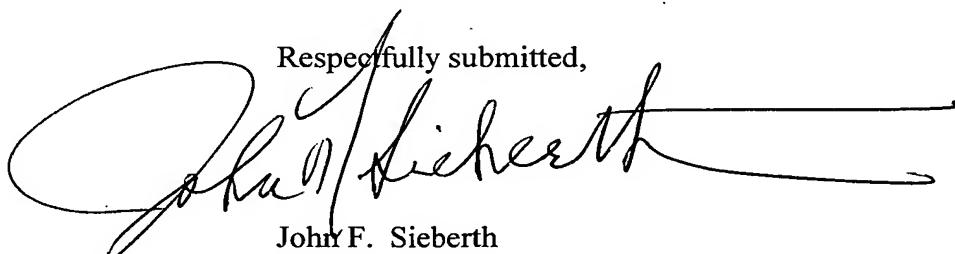
Accordingly, reconsideration of the 112, second paragraph, rejection set forth in Paragraph 6 of the Action is requested. The claims are submitted to use language which has long standing approval of the PTO itself and that is clear to those of ordinary skill in the art.

In view of the above amendments and Remarks, it is believed that the case is now in condition for allowance. Notice to this effect would be appreciated.

If, however, any matters remain in requiring further consideration, the Examiner is respectfully requested to telephone the undersigned so that such matters can be discussed, and if possible, promptly resolved.

Please continue to address all correspondence in this Application to Mr. Edgar E. Spielman, Jr. at the address of record.

Respectfully submitted,



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